

9-7-2017

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Recommended Citation

Panlilio, F. (. (2017). The United States Film, Music and Pharmaceutical Industries' Battle for International Copyright and Patent Protection and Enforcement. Retrieved from <http://epublications.bond.edu.au/odsej/11>

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THE UNITED STATES FILM, MUSIC AND PHARMACEUTICAL INDUSTRIES' BATTLE FOR INTERNATIONAL COPYRIGHT AND PATENT PROTECTION AND ENFORCEMENT

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There is tension in international intellectual property policy between less protection and more protection. The United States, a champion of expansion, plays a major role. It has contributed in multiple law-making forums. This article outlines the progress that the United States has made to further its interests in the global intellectual property law arena, both in law-making and in enforcement. It also discusses the interplay between these developments and the role of large corporations in private industry with a strong interest in intellectual property. It focuses on the film, music and pharmaceutical industries and specifically on copyright and patent laws. Albeit slow, the trend appears to be in favour of United States' interests.

INTRODUCTION

The United States has long been a major player in shaping global intellectual property rights (IPR) law. Behind US international activities lie the transnational corporate players who have a large stake in IPR and exert their influence. In particular, the film, music and pharmaceutical industries who are dominated by a small number of large corporations drive policy matters. Focusing specifically on copyright and patent developments since the conclusion of the 1994 Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement), this article explores the interplay between these industries, US international IPR policy, and developments in global intellectual property laws.

The first section considers the role of the US and their key industries of film, music and pharmaceuticals in global IPR policy. The second through fifth sections explore relevant developments and challenges in the forums where global intellectual property law is developed. The sixth section examines the impact of the current trend of Investor-State Dispute Settlement that has been incorporated in all forums. Finally, the seventh section flags the difficulties in practical enforcement of ever-increasing IPR protection standards.

This general analysis shows that global IPR policy is moving in the direction of the increased protection desired by US industries. The current trend favours the interests

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of large corporations. However, there are many challenges that make this progress slow and expensive. This is not only due to obstacles and politics in international negotiations but also to the difficult nature of practically enforcing them.

I INDUSTRY AND UNITED STATES' IPR POLICY

Most will attribute the main leaps and bounds in global IPR protection in the last 50 years to the US. The crowning achievement is the US-led TRIPS Agreement. Born out of the Uruguay round of General Agreement on Tariffs and Trade (GATT) negotiations, the TRIPS imposed upon the 164 members of the World Trade Organisation (WTO) a set of minimum standards concerning IPR – a global standard complete with an enforcement system that had never before been achieved. The US continues to exert its influence in promulgating ever higher standards of IPR protection on a transnational basis.

The United States' heavyweight influence in international forums is obvious. It has trade leverage as the largest economy in the world, accounting for roughly 25% of global GDP,¹ as well as the resources and systems to engage deeply in international policy-making forums.² US contribution of resources has often built the framework for and substantially driven international negotiations.³

Less obvious are the forces behind the United States' fierce interest and involvement in global IPR-related issues. The US is the world leader in producing knowledge-based goods such as IT, media content and pharmaceuticals, which contribute to frequent trade surpluses and about 5% to national GDP.⁴ These industries have gained great influence over US trade policy and they have taken advantage of this power to inflate the significance of IPR protection on the US international agenda.

Considering the nature of intellectual property, the political power of industries goes a long way in shaping the environment in which it is disseminated and regulated. This is because intellectual property regulation creates artificial scarcity.⁵ Unlike with physical property, sharing knowledge does not deprive the sharer of that knowledge. IPR protection works on the general basis that creators of intellectual property should

¹ World Development Indicators, *GDP 2015* (1 February 2017) The World Bank <<http://data.worldbank.org/data-catalog/GDP-ranking-table>>.

² Charan Devereaux, Robert Z Lawrence and Michael D Watkins, *Case Studies in US Trade Negotiation, Volume 1: Making the Rules* (Peterson Institute, 2006), 59.

³ Ibid.

⁴ Ibid 44, 45; Bureau of Economic Analysis, *Industry Data* (3 November 2016) US Department of Commerce <<https://www.bea.gov/iTable/iTable.cfm?ReqID=51&step=1#reqid=51&step=51&isuri=1&5114=a&5102=5>>.

⁵ Blayne Haggart, *Copyright: The global politics of digital copyright reform* (University of Toronto Press, 2014), 13.

be appropriately recognised and compensated as an incentive for further innovation. This makes intellectual property a very malleable area as there are justifications for both increased and decreased protection and regulation.⁶ Controlling this discourse is a cornerstone to the strategy that major industries are using to further their interests.

Drahos and Braithwaite claim that, 'The intellectual property standards we have today are largely the product of the global strategies of a relatively small number of companies ... that realized the value of intellectual property sooner than anyone else.'⁷ Although there are conflicting domestic interests in IPR policy,⁸ the US international standpoint is still that of a concentration of a few corporations, all of whom lobby for increased IPR protection.⁹ Three of the loudest industries in the IPR realm are film, music and pharmaceuticals. As creators of massive intellectual property output, which accounts for 100% of their revenue and often require significant sums of investment,¹⁰ it is in their interests to decrease competition and increase profits by monopolising their IPRs.

Film, Music and Copyright

The key proponents of increased copyright protection are the information and content industries: film, music, software, gaming and books.¹¹ They come together in the International Intellectual Property Alliance (IIPA), a policy development and lobbying group, through which they can exercise a 'disproportionate influence in copyright policy around the world.'¹² The most powerful of these are the film and music industries.¹³

The film industry is represented by the Motion Picture Association of America (MPAA) with consolidated power in its foreign branches as well as influence over government trade policy tantamount to that of 'a little State Department.'¹⁴ US motion pictures have long since captured the majority of foreign markets and,¹⁵ remarkably, these large stakes are held mostly in the hands of six companies which account for

⁶ Ibid 56.

⁷ Peter Drahos and John Braithwaite, *Information Feudalism* (Earthscan Publications, 2002), ix.

⁸ Anne Roemer-Mahler, 'Business conflict and global politics: The pharmaceutical industry and the global protection of intellectual property rights' (2013) 20(1) *Review of International Political Economy*, 121, 121; Blayne Haggart, *Copyfight: The global politics of digital copyright reform* (University of Toronto Press, 2014), 93-94.

⁹ Charan Devereaux, Robert Z Lawrence and Michael D Watkins, *Case Studies in US Trade Negotiation, Volume 1: Making the Rules* (Peterson Institute, 2006) 44.

¹⁰ Ibid.

¹¹ Blayne Haggart, *Copyfight: The global politics of digital copyright reform* (University of Toronto Press, 2014) 57.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid; Peter Drahos and John Braithwaite, *Information Feudalism* (Earthscan Publications, 2002) 175.

¹⁵ Peter Drahos and John Braithwaite, *Information Feudalism* (Earthscan Publications, 2002) 174.

90% of US film revenues.¹⁶ Unsurprisingly, the MPAA consistently invests in government lobbying, spending US\$2,580,000 in 2016.¹⁷

The Recording Industry Association of America (RIAA) similarly represents the music industry. Essentially, they embody four major recording companies that dominate the global music market.¹⁸ In 2016, the RIAA spent US\$4,392,911 on lobbying.¹⁹

These industries concentrate their efforts on stronger copyright protection with the sole focus of countering piracy.²⁰ Copyright recognises the creator's expression of an idea and gives them exclusive rights to reproduce it, in this case, to play or duplicate the motion pictures or recordings.²¹ It is the sole legal construct allowing these corporations to profit from their films and music. Copyright laws are largely administered nationally, and harmonisation has been difficult considering particular differences between countries. For example, there are two distinct rationales – one economic, one moral – representative of development of copyright law in the civil and common law jurisdictions respectively.²² The US industry is interested in exporting their high level copyright protection to as many other markets as possible.

Pharmaceuticals and Patents

The pharmaceutical industry has been an aggressive player in the global IPR policy scene for over 50 years,²³ and deals largely in patents. Patents offer exclusive rights to people who create new and useful inventions, in this case medicines, so that only the creators may exploit and distribute them.²⁴ Considering that pharmaceutical companies invest hundreds of millions of dollars in research and development of new medicines, with a rate of only 12% making it to clients,²⁵ they are interested in

¹⁶ Blayne Haggart, *Copyfight: The global politics of digital copyright reform* (University of Toronto Press, 2014) 57.

¹⁷ Opensecrets.org, *Motion Picture Association of America Summary* (24 March 2017) The Centre for Responsible Politics <<http://www.opensecrets.org/orgs/summary.php?id=D000027729>>.

¹⁸ EMI, Universal Music Group, Warner Music Group, and Sony Music Entertainment. Blayne Haggart, *Copyfight: The global politics of digital copyright reform* (University of Toronto Press, 2014) 57.

¹⁹ Opensecrets.org, *Recording Industry Association of America Summary* (24 March 2017) The Centre for Responsible Politics <<http://www.opensecrets.org/orgs/summary.php?cycle=2016&id=D000000581>>

²⁰ Blayne Haggart, *Copyfight: The global politics of digital copyright reform* (University of Toronto Press, 2014) 103.

²¹ Deli Yang, *Understanding and Profiting from Intellectual Property* (Palgrave Macmillan, 2nd ed, 2013) 21.

²² Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights Vol 1* (Oxford University Press, 2006) 3-18.

²³ For their role in negotiating TRIPS, see, eg, Charan Devereaux, Robert Z Lawrence and Michael D Watkins, *Case Studies in US Trade Negotiation, Volume 1: Making the Rules* (Peterson Institute, 2006); see also Susan K Sell, 'TRIPS-plus free trade agreements and access to medicines' (2007) 28 *Liverpool Law Review* 41.

²⁴ Deli Yang, *Understanding and Profiting from Intellectual Property* (Palgrave Macmillan, 2nd ed, 2013) 18.

²⁵ PhRMA, *Clinical Trials*, PhRMA <<http://www.phrma.org/advocacy/research-development/clinical-trials>>.

expanding the scope of protection and extending the length of coverage as long as possible and in as many countries as possible. They support the rationale that stronger patent protection will prevent imitations once the product is on the market and thus compensate and incentivise the R&D expenditure.

They are represented in the US by the Pharmaceutical Research and Manufacturers of America (PhRMA) and include giants such as Pfizer, Merck and Bristol Myers-Squibb. Those three corporations alone spent a total of \$19,090,000 on lobbying in 2016. Former Pfizer chairman, Edmund Pratt,²⁶ and pharmaceuticals advocate, Jacques Gorlin, were instrumental in the execution of the TRIPS Agreement.²⁷ Gorlin has since gone on to found the American BioIndustry Alliance (ABIA) with a focus on continuing to champion stronger international protection of pharmaceutical products. Member corporations include Bristol Myers-Squibb, Eli Lilly, General Electric, Merck, Pfizer and Proctor & Gamble.²⁸

II MULTILATERAL AGREEMENTS

Multilateral agreements involve a vast majority of countries, or are hosted by global organisations such as the United Nations. The biggest success for industry in this arena was the 1994 TRIPS Agreement which was led by the efforts of the US. On behalf of the US, Gorlin declared that, in the agreement, 'we got 95% of what we wanted'.²⁹ However, as Sell argues, 'that 5% has always mattered,' and US industry continues to campaign for more IPR protection.³⁰

The WTO

Since the TRIPS Agreement, the US has met fierce resistance in the WTO forum. The standards imposed have had negative repercussions on developing nations, and advocacy for their interests has gained serious traction on the multilateral level.³¹

A prime example was the Doha Declaration on the TRIPS Agreement and Public Health adopted in 2001. In response to the outcry about the public health crises in developing nations, the Declaration affirmed the WTO's commitment to address these

²⁶ See, eg, Charan Devereaux, Robert Z Lawrence and Michael D Watkins, *Case Studies in US Trade Negotiation, Volume 1: Making the Rules* (Peterson Institute, 2006); see also Susan K Sell, 'TRIPS-plus free trade agreements and access to medicines' (2007) 28 *Liverpool Law Review* 41.

²⁷ Susan K Sell, 'TRIPS-plus free trade agreements and access to medicines' (2007) 28 *Liverpool Law Review* 41, 52.

²⁸ *Ibid.*

²⁹ Susan K Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TPP' (2011) 18(2) *Journal of Intellectual Property Law* 447, 448.

³⁰ *Ibid.*

³¹ See, eg, Srividhya Ragavan, 'Drugs, Drugs Everywhere but Just Not for the Poor' (2016) 8(1) *The WIPO Journal: Analysis of Intellectual Property Issues* 41; Susan K Sell, 'TRIPS-plus free trade agreements and access to medicines' (2007) 28 *Liverpool Law Review* 41.

problems by clarifying and encouraging the use of TRIPS flexibilities.³² One such flexibility is the right of each member country to grant compulsory licences. These compel pharmaceutical companies to make medicines available in the member country on grounds – and, importantly, prices – determined by the state.³³ The declaration even committed the WTO to provide assistance to developing nations in putting compulsory licences into effect.³⁴

Leading up to the declaration, the US opposed. Their submissions echoed of the arguments put forward by PhRMA,³⁵ claiming that price was merely one factor in the public health crisis and reiterating the need for protection of test data and patents.³⁶ They campaigned for restrictive limitations on compulsory licences, with particular opposition against member countries' discretion concerning the terms of the licences.³⁷ To substantiate their cause, PhRMA relied heavily on a Harvard study that they had commissioned themselves.³⁸ This was, however, insufficient to counter the volumes of comprehensive submissions from their opponents, resulting in a large dent in their TRIPS victory.

Further disenchantment with the WTO coincides with the general deadlock in the latest Doha Round of negotiations. Beginning in 2001, the negotiations mirror its predecessors in that it requires full consensus of all 164 member countries on several issues, such as agriculture and intellectual property, which would culminate in one overarching agreement.³⁹ The widespread, all or nothing, nature of the forum makes it complex, difficult and frustratingly slow for proponents of a single issue such as IPRs. There is currently a stalemate between major developed and developing countries due to unwillingness or inability to offer concessions.⁴⁰ The longest round yet, the Doha negotiations have been widely regarded as a failure and,⁴¹ despite

³² *Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN(01)/DEC/2 (14 November 2001) (Ministerial Declaration) [1]-[2].

³³ *Ibid* [5].

³⁴ *Ibid* [6].

³⁵ Frederick M Abbott, 'The Doha Declaration on the TRIPS Agreement and Public Health: Light a dark corner at the WTO' (2002) 469, 482, 485.

³⁶ *Ibid* 482.

³⁷ *Ibid*.

³⁸ Susan K Sell, 'TRIPS-plus free trade agreements and access to medicines' (2007) 28 *Liverpool Law Review* 41, 46.

³⁹ World Trade Organisation, *Doha Round: what are they negotiating?* World Trade Organisation <https://www.wto.org/english/tratop_e/dda_e/update_e.htm>.

⁴⁰ The Editorial Board, 'Global Trade After Doha's Failure', *The New York Times* (New York) 1 January 2016, A22.

⁴¹ See, eg, The Editorial Board, 'Global Trade After Doha's Failure', *The New York Times* (New York) 1 January 2016, A22; Kimberly Amadeo, 'What Is the Doha Round of Trade Talks?' *The Balance* (online) 13 October 2016 <<https://www.thebalance.com/what-is-the-doha-round-of-trade-talks-3306365>>; Anonymous, 'The Doha round... and round... and round', *The Economist* (London), 31 July 2008.

continued participation, US industries have branched into other forums to promote IPR protection.

WIPO

The other major multilateral forum that covers intellectual property is the World Intellectual Property Organisation (WIPO), a branch of the United Nations. With the stalemate in the WTO, activity has shifted back to WIPO. This is ironic given that intellectual property was ushered into the field of the WTO (or, as it then was, the GATT) in an attempt to escape the slow politics of the United Nations.⁴² This is testimony to the longstanding tactic of 'forum shopping' employed by IPR proponents.

A response to the digitisation of copyright materials came in the form of the 1996 WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT) which are collectively known as the 'Internet Treaties'. They served as a framework for party countries to update their copyright laws and generally favoured the major corporations of the copyright industries as they addressed the new ease of copying and transmission.⁴³

Bruce Lehman, undersecretary of commerce for intellectual property and director of the Patent and Trademark Office, was the main US representative for WIPO and was instrumental in negotiating the Internet Treaties.⁴⁴ He favoured the copyright-based industries - representatives of which comprised his senior staff - and his policy focus, demonstrated by his 1995 proposed 'white paper' agenda, was disproportionately based on copyright compared to other areas of intellectual property.⁴⁵ The similarity of early Internet Treaty drafts with the white paper is evidence of his influence in WIPO.⁴⁶

A key provision was article 11 of the WCT. By 'requiring adequate protection and effective legal remedies' against infringement of digitally protected copyright works, it went further than simply consolidating the paradigmatic Berne Convention and the TRIPS Agreement.⁴⁷ Given the increasing prevalence of digital piracy, this favoured the copyright industries. The language is however deliberately ambiguous and hides the dilution of the original US proposals which made 'unlawful the importation, manufacture or distribution of protection-defeating devices.'⁴⁸ This was one of a

⁴² Charan Devereaux, Robert Z Lawrence and Michael D Watkins, *Case Studies in US Trade Negotiation, Volume 1: Making the Rules* (Peterson Institute, 2006), 53.

⁴³ Blayne Haggart, *Copyfight: The global politics of digital copyright reform* (University of Toronto Press, 2014) 16.

⁴⁴ *Ibid* 110.

⁴⁵ *Ibid* 111.

⁴⁶ *Ibid* 116.

⁴⁷ *Ibid* 119-112.

⁴⁸ *Ibid* 18, 119.

number of issues that demonstrated the forces at play in the multilateral arena that hindered Lehman's efforts, despite his powerful influence.⁴⁹ Ultimately, while the final Internet Treaties addressed all the issues in the white paper, many substantive provisions were watered down in the negotiation process.

Another IPR development in WIPO is the Patent Law Treaty (PLT) of 2000. It aims for the harmonisation and streamlining of the requirements and procedures necessary when applying for regional, national and international patents.⁵⁰ US influence in these negotiations was limited due to internal conflict, but the resulting treaty was beneficial for the pharmaceutical industry in reducing procedural costs and minimising loss of rights.⁵¹ This treaty deals only with procedural issues. An attempt at harmonising substantive issues of patent law, which would make cross-border enforcement much easier,⁵² commenced shortly after.⁵³ A first draft was proposed in 2001, but continued sessions through to 2005 saw only the broadening of its scope and continued lack of consensus.⁵⁴ The stalemate led to the suspension of negotiations in 2006.⁵⁵

Both the WTO and WIPO exemplify the challenges that US industry faces when campaigning on a multilateral scale. While it seems logical to achieve global harmonisation through these platforms, their scale makes them complex, highly political and slow. Even with full backing by US governments, industries promoting higher IPR protection are stymied by opposition from a variety of other countries, whose interests are pointedly accommodated in these organisations. Further, treaties are difficult to pass through US congress.⁵⁶ The Internet Treaties sparked fierce debate among industry representatives in the United States.⁵⁷ The heavy-weight influence of the MPAA and the RIAA played an important role in eventually shaping the Digital Millennium Copyright Act (DCMA).⁵⁸

⁴⁹ For example the ISP provisions, see Blayne Haggart, *Copyright: The global politics of digital copyright reform* (University of Toronto Press, 2014) 122.

⁵⁰ Paul Claus, 'Patent Law Treaty: simplified procedures for national regional patent formalities' (2000) 22 *World Patent Information* 287, 288.

⁵¹ Cees Mulder, 'Patent Law Treat: Promises Not Delivered – How the negotiations resulted in ambiguities in the treaty' (2014) 17(5-6) *The Journal of World Intellectual Property*, 160, 165.

⁵² Jerome H Reichman and Rochelle Cooper Dreyfuss, 'Harmonisation without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty' (2007) 57(1) *Duke Law Journal* 85, 87; Marketa Trimble, *Global Patents* (Oxford University Press, 2012) 9-10.

⁵³ World Intellectual Property Organisation, *Draft Substantive Patent Law Treaty* World Intellectual Property Organisation <www.wipo.int/patent-law/en/draft_splt.htm>.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Robert A Freeman, 'The Trans-Pacific Partnership and Pharmaceutical Innovation' (2016) 12 *Research in Social and Administrative Pharmacy* 633, 633-534.

⁵⁷ Blayne Haggart, *Copyright: The global politics of digital copyright reform* (University of Toronto Press, 2014) 128.

⁵⁸ *Ibid.* 145.

III BILATERAL AGREEMENTS

Despite difficulties in the multilateral arena, there has been increased activity in the bilateral sphere. The US has entered Free Trade Agreements (FTAs) with 17 other countries since the conclusion of TRIPS.⁵⁹ US industry has taken advantage of the nature of TRIPS as a floor rather than a ceiling for IPR protection standards. All of the FTAs seek to expand intellectual property protection in the partner countries, delineating terms that are either TRIPS-plus (adding more restrictions than required by the TRIPS) or TRIPS-minus (removing flexibilities given in the TRIPS agreement). Increasing IPR protection overseas is the primary reason for the FTAs.⁶⁰

The bilateral forum has led the harmonising of IPR laws to a high standard. The most favoured nation article in the TRIPS agreement provides that countries may not afford different standards to just one nation.⁶¹ This means that, as a result of the deals with the US, FTA trade partners must enhance their intellectual property laws to afford the same level of protection to all member countries and not just to the US. The more FTAs the US concludes, the wider the IPR protection.

The FTAs were an opportunity to elevate the protection term and scope of copyright above the minimum standards of TRIPS, as well as to clarify the provisions of the Internet Treaties to bring them in line with the stricter standards of the original white paper.⁶² The US sought to extend the protection term from the 50 year TRIPS minimum to 70 years, to clarify Art 11 of the WCT,⁶³ and generally to bring their trading partners' copyright laws in line with the multilateral-plus standards of the DCMA, especially on the issues of rights management information, temporary reductions and immunity of Internet Service Providers (ISPs).⁶⁴

⁵⁹ These countries are Jordan (2001), Australia (2004), Chile (2004), Singapore (2004), Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua) and the Dominican Republic (2005), Bahrain (2006), Morocco (2006), Oman (2006), Peru (2007), Panama (2012), Colombia (2012), and South Korea (2012).

⁶⁰ Susan K Sell, 'TRIPS-plus free trade agreements and access to medicines' (2007) 28 *Liverpool Law Review* 41, 59.

⁶¹ *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*') art 4.

⁶² Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights Vol 1* (Oxford University Press, 2006) 173.

⁶³ See, eg, *Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area*, United States-Jordan, signed 24 October 2000, (entered into force 17 December 2001) art 13. The minimum term of 70 years is calculated from publication for most neighbouring rights and *post mortem auctoris* for works of authorship.

⁶⁴ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights Vol 1* (Oxford University Press, 2006) 173.

While the 2001 FTA with Jordan provided a kind of pilot project for the US,⁶⁵ it was the subsequent 2004 FTA with Australia that proved controversial. In particular, 'the provisions with respect to copyright and neighbouring rights were extraordinarily detailed.'⁶⁶ The US effectively required Australia to replicate the DCMA such that, one-sidedly, Australia was compelled to drastically reform its entire copyright law, enacting the *US Free Trade Agreement Implementation Act 2004* (Cth) which was over one hundred pages long.⁶⁷ This was followed by the *Copyright Legislation Amendment Act 2004* (Cth) in response to complaints of unsatisfactory implementation by the United States Trade Representative (USTR).⁶⁸ This FTA basically served as an initial template, evidenced by the near identical FTA with Singapore in the same year and the lengthening copyright provisions which built on it in all succeeding FTAs.⁶⁹

More drastic are the patent provisions in these FTAs. Among other things, the US utilised these agreements to reverse the effects of the Doha Declaration and press on with their agenda. Common to the FTAs are provisions linking market approval and registration to the patent status of a drug, tightening regulation of data exclusivity, prohibiting parallel importing, expanding subject matter, lengthening patent terms, and limiting compulsory licences.⁷⁰

Market approval requirements go hand in hand with restrictions on compulsory licences. The need for a patent owner's consent to market a product makes the method for obtaining compulsory licences as outlined in TRIPS near impossible to implement.⁷¹ Even with approval for a licence, these provisions allow pharmaceutical companies to block distribution.⁷² The US-Jordan, US-Singapore, and US-Morocco FTAs, for example, explicitly limit the circumstances in which a compulsory licence may be granted to 'national emergencies' or serious epidemic diseases.⁷³

Further provisions favourable to the pharmaceutical industry are national exhaustion and extended protection terms. By exporting the national exhaustion approach of the US to other countries, US companies come to control the parallel importation of drugs

⁶⁵ See generally Bashar H Malkawi, 'The Intellectual Property Provisions of the United States-Jordan Free Trade Agreement: Template or Not Template' (2006) 9(2) *The Journal of World Intellectual Property* 213.

⁶⁶ Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights Vol 1* (Oxford University Press, 2006) 173.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 224-232.

⁷⁰ *Ibid.*; Susan K Sell, 'TRIPS-plus free trade agreements and access to medicines' (2007) 28 *Liverpool Law Review* 41, 59.

⁷¹ Susan K Sell, 'TRIPS-plus free trade agreements and access to medicines' (2007) 28 *Liverpool Law Review* 41, 61.

⁷² *Ibid.*

⁷³ *Ibid.*

in those countries, which removes the flexibility given by the TRIPS to freely regulate this issue.⁷⁴ Under FTA provisions, the term of patent protection for pharmaceuticals has strayed beyond the TRIPS 20-year minimum.⁷⁵ The provisions allow automatic extensions for delays in patent examination and marketing approvals and, going beyond even domestic US laws, the term of these extensions is not limited.⁷⁶

Significant 'progress' has been made in the bilateral arena. This is recognised in the reports made on the FTAs by several branches of the Industry Trade Advisory Committee (ITAC), providing feedback on the success of each and making recommendations for future agreements. ITAC-15 (formerly IFAC-3) is the subdivision that reports specifically on intellectual property gains. The current vice-chairman, Michael Castellano, represents Walt Disney while among the 18 other members are representatives from IIPA, PhRMA, and the Screen Actors Guild-American Federation of Television and Radio.⁷⁷ It has previously included Jacques Gorlin and representatives from Eli Lilly, Merck, Pfizer, Time Warner, the MPAA and the RIAA.⁷⁸ The ITAC-15 reports are very detailed, analysing each section of each FTA intellectual property chapter. Generally speaking, ITAC-15 has been more or less satisfied with copyright provisions but is very urgent and critical about achievements concerning patents.⁷⁹

No new bilateral agreements have been concluded since the KORFTA with South Korea in 2012. This is largely due to a shift in concentration to negotiating the Trans-Pacific Partnership (TPP), a plurilateral agreement which is discussed further below. Since President Trump's executive order to withdraw the US from the freshly concluded TPP, he has expressed an intention to return to the pursuit of bilateral

⁷⁴ Ibid 61.

⁷⁵ Ibid 63.

⁷⁶ Susan K Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP' (2011) 18(2) *Journal of Intellectual Property Law* 447, 448.

⁷⁷ International Trade Administration, *The Industry Trade Advisory Committee on Intellectual Property Rights*, International Trade Administration <www.trade.gov/itac/committees/itac15.asp>.

⁷⁸ Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3), *Advisory Committee Report to the President, the Congress and the United States Trade Representative on the U.S.-Dominican Republic Free Trade Agreement* (22 April 2004); Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-15), *Advisory Committee Report to the President, the Congress and the United States Trade Representative on the U.S.-Panama Trade Promotion Agreement* (25 April 2007).

⁷⁹ See, eg, Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3), *Advisory Committee Report to the President, the Congress and the United States Trade Representative on the U.S.-Morocco Free Trade Agreement* (6 April 2004); Industry Trade Advisory Committee on Intellectual Property Rights (ITAC-15), *Advisory Committee Report to the President, the Congress and the United States Trade Representative on the U.S.-Colombia Trade Promotion Agreement* (20 September 2006).

agreements.⁸⁰ It is too soon to gauge the success of this intention especially amid scepticism from several countries, some waiting to see how impending renegotiations of the North American Free Trade Agreement (NAFTA) with Mexico and Canada will go.⁸¹ Thus far, FTAs have been completed with much weaker countries than the US, perhaps suggesting the difficulty of negotiating with other world powers. Major trading partner, Japan, has indicated its disappointment in US withdrawal in the TPP and the unlikelihood of a better bilateral deal between the nations.⁸² On the other hand, the UK and the US have recently entered preliminary talks about negotiating a deal after Brexit.⁸³ While it is difficult to predict what will happen next, unilateral activities pursued by the USTR as discussed below reveal the countries about which US IPR industry is most concerned and who may be the target of future FTAs.

IV UNILATERAL FORUM

Industries in the US also have recourse to a controversial unilateral option that comes in the form of the Special 301 provision, administered by the USTR. In 1984, in response to mounting pressure from US industries, IPR was made actionable under s 301 of the 1974 *Trade Act*, which allows US government to unilaterally raise tariffs against uncooperative trading partners.⁸⁴ It allowed companies and industry associations to request investigations by the USTR on IPR infringing countries.⁸⁵ In 1988, the *Omnibus Trade and Competitiveness Act* further introduced s 182 of the 1974 *Trade Act*, which became known as the 'Special 301' because it requires the USTR to submit an annual report identifying countries which are failing to provide adequate protection to US IPR holders.⁸⁶ The report designates infringing countries on a 'Watch List', or a 'Priority Watch List' for serious violators. Accordingly, the Special 301 reports are meant to guide US government on giving effect to s 301, as well as in general trade relations with the countries featured in the report. The reports acted as

⁸⁰ Alice Foster and Reiss Smith, 'What is TPP? Why is Donald Trump pulling out of the Trans-Pacific Partnership?', *Express* (online) 23 January 2017 <www.express.co.uk/news/politics/757837/TPP-what-isTrans-Pacific-Partnership-trade-deal-Donald-Trump-why-pull-out-US-America>.

⁸¹ Don Lee, 'Trump wants to cut bilateral trade deals, but what if nobody comes to the table?', *Los Angeles Times* (online) 26 May 2017 <<http://www.latimes.com/business/la-fi-trump-trade-strategy-20170526-story.html>>.

⁸² *Ibid.*

⁸³ Tim Wallace, 'US and UK to start trade talks next month to ensure deal soon after Brexit', *The Telegraph* (online), 20 June 2017 <<http://www.telegraph.co.uk/business/2017/06/20/us-uk-start-trade-talks-next-month-ensure-deal-soon-brexite/>>.

⁸⁴ Charan Devereaux, Robert Z Lawrence and Michael D Watkins, *Case Studies in US Trade Negotiation, Volume 1: Making the Rules* (Peterson Institute, 2006) 51.

⁸⁵ *Ibid.*

⁸⁶ *Ibid* 61-62.

a menacing warning for featuring countries and was a powerful force that drove TRIPS negotiation to completion.⁸⁷

Recently, the US's capacity to flex its trade muscles through s 301 has been restrained. TRIPS provisions prohibit the threat, let alone the execution, of unilateral trade sanctions over IPR, and any such actions generally result in complaints filed at the WTO.⁸⁸ Consequently, the response to Special 301 varies by country.⁸⁹ India, for example, has simply remained on the Priority Watch List since its conception.⁹⁰ The USTR however continues to publish strong messages in the annual reports with a disclaimer that purports not to contravene TRIPS obligations,⁹¹ nonetheless applying pressure on infringing nations by straining general trade relationships with the US and constantly re-emphasising their IPR interests.⁹²

The USTR is the pocket Hercules of US Government, especially in securing increased global IPR protection. Although a relatively small department,⁹³ it is responsible for negotiating all trade agreements.⁹⁴ Importantly, the USTR runs primarily on resources provided by US industry and, by most accounts, is the effective embodiment of their interests in not just the US government, but the global political arena.⁹⁵ The film, television and pharmaceutical industries exercise their influence through the USTR.

As part of the Special 301 process, organisations including IIPA and PhRMA make submissions on their IPR protection experiences with foreign countries, recommending which nations should be placed on the watch lists.⁹⁶ Historically, most of the countries on the lists are largely a reflection of IIPA and PhRMA's recommendations.⁹⁷ The USTR relies heavily on these submissions because carrying

⁸⁷ Ibid 64.

⁸⁸ Blayne Haggart, *Copyfight: The global politics of digital copyright reform* (University of Toronto Press, 2014) 81.

⁸⁹ Ibid.

⁹⁰ International Intellectual Property Alliance, *Appendix B: Chart of Countries' Special 301 Placement (1989-2016)* (9 February 2017) International Intellectual Property Alliance <<http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>>.

⁹¹ See USTR 2016 Special 301 Report, 13.

⁹² Blayne Haggart, *Copyfight: The global politics of digital copyright reform* (University of Toronto Press, 2014) 81.

⁹³ Peter Drahos and John Braithwaite, *Information Feudalism* (Earthscan Publications, 2002), 94.

⁹⁴ United States Trade Representative, *Mission of the USTR*, Office of the United States Trade Representative <<https://ustr.gov/about-us/about-ustr>>.

⁹⁵ See, eg, Blayne Haggart, *Copyfight: The global politics of digital copyright reform* (University of Toronto Press, 2014) 81; Srividhya Ragavan 'Drugs, Drugs Everywhere but Just Not for the Poor' (2016) 8(1) *The WIPO Journal: Analysis of Intellectual Property Issues* 41, 50.

⁹⁶ Srividhya Ragavan, 'Drugs, Drugs Everywhere but Just Not for the Poor' (2016) 8(1) *The WIPO Journal: Analysis of Intellectual Property Issues* 41, 50.

⁹⁷ Susan K Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003)126–129.

out Special 301 is a massive and resource heavy process.⁹⁸ Drahos and Braithwaite observe that 'It is only really possible because corporate America picks up the tab. It provides the global surveillance network, the numbers for the estimates on piracy and much of the evaluation and analysis.'⁹⁹

The 2016 Special 301 Report listed 23 countries in the Watch List and 11 countries in the Priority Watch List.¹⁰⁰ IIPA had recommended nine countries for the Watch List and six for the Priority Watch List, while PhRMA had recommended seven countries in the Watch List and 13 countries on the Priority Watch List.¹⁰¹ Table 1 shows their relative success. IIPA saw greater success in its submissions although it targeted fewer than the PhRMA. The only new addition to the 2016 list was Switzerland which debuts on the Watch List.¹⁰² Belarus and Trinidad & Tobago end long and short runs on the Watch List respectively.¹⁰³ Ecuador shifted from the Priority Watch List to the Watch List.¹⁰⁴ Both organisations have recently made submissions for the 2017 report.¹⁰⁵

⁹⁸ Peter Drahos and John Braithwaite, *Information Feudalism* (Earthscan Publications, 2002) 93-94.

⁹⁹ *Ibid* 107.

¹⁰⁰ USTR 2016 Special 301 Report, 3.

¹⁰¹ PhRMA, *Pharmaceutical Research and Manufacturers of America (PhRMA) Special 301 Submission 2016*, PhRMA <www.phrma.org/sites/default/files/pdf/PhRMA_2016_Special_301_Submission.pdf>; International Intellectual Property Alliance, *IIPA 2016 Special 301 Report*, IIPA <www.iipawebsite.com/2016_SPEC301_TOC.htm>.

¹⁰² Intellectual Property Alliance, *Appendix B: Chart of Countries' Special 301 Placement (1989-2016)* (9 February 2017) International Intellectual Property Alliance <<http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>>.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*.

¹⁰⁵ IIPA, *IIPA Press Release on 2017 Special 301 Submission to USTR*, (9 February 2017) IIPA <www.iipawebsite.com/pdf/2017SPEC301PRESSRELEASE.PDF>; PhRMA, *PhRMA Special 301 Submission 2017* (10 February 2017) PhRMA <www.phrma.org/phrma-special-301-submission>.

Table 1 ¹⁰⁶	Priority Watch List	Watch List	Out of Cycle Review
USTR Report Bold if recommended by IIPA <u>Underlined if recommended by PhRMA</u>	<ul style="list-style-type: none"> • <u>Algeria</u> • <u>Argentina</u> • Chile • China • India • <u>Indonesia</u> • Kuwait • Russia • Thailand • Ukraine • <u>Venezuela</u> 	<ul style="list-style-type: none"> • Barbados • Bolivia • Brazil • Bulgaria • Canada • Colombia • Costa Rica • Dominican Republic • Ecuador • <u>Egypt</u> • Greece • Guatemala 	<ul style="list-style-type: none"> • Jamaica • Lebanon • Mexico • Pakistan • <u>Peru</u> • <u>Romania</u> • Switzerland • Turkey • Turkmenistan • Uzbekistan • <u>Vietnam</u>
PhRMA unimplemented submissions *if on other list	<ul style="list-style-type: none"> • Canada* • Turkey* • Brazil* • Colombia* • Ecuador* 	<ul style="list-style-type: none"> • Australia • Korea 	<ul style="list-style-type: none"> • Canada • Ecuador • India
IIPA unimplemented submissions *if on other list	<ul style="list-style-type: none"> • Vietnam* 	<ul style="list-style-type: none"> • Hong Kong • Indonesia* • Taiwan • United Arab Emirates 	

The annual nature of the Special 301 system pressures all countries. Countries such as Greece, the Czech Republic, Spain and Malaysia have seen periods of time both on and off the list as a result of tightening and slackening of domestic IPR regulations.¹⁰⁷ Although the threat of sanctions is largely empty, which greatly diminishes the potency that this unilateral measure once had, the US is still not precluded from engaging in disputes regarding TRIPS compliance in the WTO forum and may, of course, impose sanctions on non-WTO member nations. The level of industry involvement shows that the s 301 system is effectively 'public law devoted to the service of private corporate interests.'¹⁰⁸

¹⁰⁶ USTR 2016 Special 301 Report; PhRMA, *Pharmaceutical Research and Manufacturers of America (PhRMA) Special 301 Submission 2016*, PhRMA <www.phrma.org/sites/default/files/pdf/PhRMA_2016_Special_301_Submission.pdf>; International Intellectual Property Alliance, *IIPA 2016 Special 301 Report*, IIPA <www.iipawebsite.com/2016_SPEC301_TOC.htm>.

¹⁰⁷ International Intellectual Property Alliance, *Appendix B: Chart of Countries' Special 301 Placement (1989-2016)* (9 February 2017) International Intellectual Property Alliance <<http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>>.

¹⁰⁸ Peter Drahos and John Braithwaite, *Information Feudalism* (Earthscan Publications, 2002) 89.

V PLURILATERAL AGREEMENTS

In an attempt to take broader steps towards IPR harmonisation, there has been a trend to pursue stronger IPR in the plurilateral realm, making private agreements between a small number of like-minded countries. The two main agreements that have featured IPR are the Anti-Counterfeiting Trade Agreement (ACTA) and the TPP.

Anti-Counterfeiting Trade Agreement

The ACTA began negotiations in 2007. Participation was voluntary to countries that shared the common goal of increasing IPR protection standards.¹⁰⁹ Despite its name it was hardly a trade agreement, but just an intellectual property one.¹¹⁰ The initiative was led by the US and Japan, and included countries such as the European Commission, Germany, Switzerland, Australia, Korea, Canada, Jordan, Morocco, Mexico, and the United Arab Emirates.¹¹¹

Highly controversial was the secrecy in which negotiations were held, opening up only after a couple of drafts were leaked.¹¹² Equally controversial was the privileged involvement of private corporations.¹¹³ The agreement clearly reflected their interests,¹¹⁴ and the intention of participants to circumvent the other platforms where they were met with resistance by developing nations.¹¹⁵ The agreement was a stepping stone to export agreed conventions more easily to the rest of the world.¹¹⁶

In terms of copyright, which received the spotlight in the agreement,¹¹⁷ negotiations drafts revealed intentions to make ACTA a platform for further TRIPS-plus provisions. Controversially, there was clear sentiment to export US 'notice and takedown' methods, increase IPR-holder control over ISPs, and criminalise circumvention of digital protection methods as suggested during negotiations over the Internet Treaties.¹¹⁸ A similar pattern occurred as in WIPO, where the eventual

¹⁰⁹ Joe Karaganis (ed), *Media Piracy in Emerging Economies* (Social Science Research Council, 2011) 82.

¹¹⁰ Ibid; Blayne Haggart, *Copyright: The global politics of digital copyright reform* (University of Toronto Press, 2014), 141; Ruth L Okediji and Margo A Bagley (eds), *Patent Law in Global Perspective* (Oxford University Press, 2014); Susan K Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TPP' (2011) 18(2) *Journal of Intellectual Property Law* 447, 456.

¹¹¹ Joe Karaganis (ed), *Media Piracy in Emerging Economies* (Social Science Research Council, 2011) 82.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Blayne Haggart, *Copyright: The global politics of digital copyright reform* (University of Toronto Press, 2014) 141.

¹¹⁵ Joe Karaganis (ed), *Media Piracy in Emerging Economies* (Social Science Research Council, 2011) 82.

¹¹⁶ Susan K Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TPP' (2011) 18(2) *Journal of Intellectual Property Law* 447, 456; Ruth L Okediji and Margo A Bagley (eds), *Patent Law in Global Perspective* (Oxford University Press, 2014) 114.

¹¹⁷ Blayne Haggart, *Copyright: The global politics of digital copyright reform* (University of Toronto Press, 2014) 141.

¹¹⁸ Joe Karaganis (ed), *Media Piracy in Emerging Economies* (Social Science Research Council, 2011) 82.

provisions were watered down versions of US requests;¹¹⁹ for example, 'notice and takedown' provisions were completely removed and the circumvention provisions echo the Internet Treaties.¹²⁰ Nonetheless, it was still a TRIPS-plus document and a step, albeit small, in the desired direction.¹²¹

The ACTA was largely silent on patent protection. Again, the US made efforts to strengthen border enforcement by including in-transit seizure of generic drugs.¹²² This was excluded from the final agreement, which was concluded and signed by 8 countries in October 2011.¹²³ The failure of the US to exert influence, even with the full backing and involvement of the copyright and patent industries, demonstrates that without broader considerations outside of IPR on the table, they do not have sufficient leverage to assert control over international negotiations.¹²⁴

The ACTA ran into difficulties at its conclusion and it is now widely regarded as a failure. The major hurdle was the extreme backlash from the public. Not least because of the agreement's secrecy and shift towards consumer penalisation, protests numbering in the hundreds of thousands across Europe led to the European Commission's vote against it.¹²⁵ No other countries have made further moves to put the agreement into effect.¹²⁶ It comes into effect when 6 countries ratify it, but so far only Japan has done so.

Trans-Pacific Partnership

The US intellectual property industries were in the midst of negotiating another agreement. After the ACTA, attention shifted to the domain of the TPP. This was a plurilateral agreement involving the US, Canada, Japan, New Zealand, Australia, Peru, Mexico, Chile, Singapore, Brunei, Malaysia and Vietnam. It sought to reduce trade barriers on a plethora of issues.¹²⁷ Secret negotiations began in 2008.¹²⁸ As well as being a second chance to keep the IPR conversation alive, the TPP would remedy

¹¹⁹ Blayne Haggart, *Copyright: The global politics of digital copyright reform* (University of Toronto Press, 2014) 142.

¹²⁰ Joe Karaganis (ed), *Media Piracy in Emerging Economies* (Social Science Research Council, 2011) 83.

¹²¹ *Ibid.*

¹²² Ruth L Okediji and Margo A Bagley (eds), *Patent Law in Global Perspective* (Oxford University Press, 2014) 86.

¹²³ *Ibid* 86, 113.

¹²⁴ Blayne Haggart, *Copyright: The global politics of digital copyright reform* (University of Toronto Press, 2014) 142.

¹²⁵ *Ibid* 199; Ruth L Okediji and Margo A Bagley (eds), *Patent Law in Global Perspective* (Oxford University Press, 2014) 115.

¹²⁶ Ruth L Okediji and Margo A Bagley (eds), *Patent Law in Global Perspective* (Oxford University Press, 2014) 115.

¹²⁷ Robert A Freeman, 'The Trans-Pacific Partnership and pharmaceutical innovation' (2016) 12 *Research in Social and Administrative Pharmacy* 633, 633.

¹²⁸ Blayne Haggart, *Copyright: The global politics of digital copyright reform* (University of Toronto Press, 2014) 248-249.

the lack of leverage experienced in the ACTA and the Internet Treaties. It presented an opportunity 'to lay out rights and obligations on IPR enforcement better than it did in the ACTA.'¹²⁹

Regarding copyright, the US was under pressure to duplicate the provisions of its strongest bilateral FTAs.¹³⁰ Once again the US copyright industries were deeply intertwined with US policy. They wanted the USTR to push fiercely for much the same concessions as before and to effectively export the provisions of the DMCA.¹³¹ Not all of these were achieved; less than perfect results were attained in, for example, the ISP provisions and protection of temporary copies.¹³² Nevertheless, a strong copyright agreement was made, affecting yet more countries.

The final TPP provisions were also a victory for the pharmaceutical industries, replicating many of the TRIPS-plus patent standards in their FTAs. Patent term extensions for pharmaceuticals also breached the standard 20 years, scope of subject matter was widened making secondary patents easier to get, and the suite of available remedies for infringements was broadened.¹³³ Dissatisfaction by the pharmaceutical industry largely lay in the IPR area of regulatory data protection which is distinct from patents.¹³⁴

The largest victory in the TPP for IPR industries was that it allowed individual corporations to directly sue state governments for unsatisfactory protection of their IPRs.¹³⁵ This, if anything, is a powerful manifestation of the influence of relevant industries on global IPR policy. The Obama administration, responsible for the TPP, was overwhelmingly in support of the IPR industries, as it was during the negotiation of the TRIPS Agreement.¹³⁶

The TPP nevertheless met its doom when, on 23 January 2017, the US elected President Trump. Within two days of inauguration, he signed an executive order to withdraw

¹²⁹ Ibid 249.

¹³⁰ Karina Luchetti, 'Hollywood, copyright and TPP' (2016) 132 *Chasqui: Latin American Journal of Communication* 205, 212.

¹³¹ Ibid 214.

¹³² Ibid 215, 219.

¹³³ Brook Baker, 'TPP = Transnational Pharmaceutical Profiteering', *Guardian* (Sydney), 27 January 2016, 9.

¹³⁴ Ibid; Robert A Freeman, 'The Trans-Pacific Partnership and pharmaceutical innovation' (2016) 12 *Research in Social and Administrative Pharmacy* 633, 634.

¹³⁵ Brook Baker, 'TPP = Transnational Pharmaceutical Profiteering', *Guardian* (Sydney), 27 January 2016, 9; Robert A Freeman, 'The Trans-Pacific Partnership and pharmaceutical innovation' (2016) 12 *Research in Social and Administrative Pharmacy* 633, 635.

¹³⁶ Susan K Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP' (2011) 18(2) *Journal of Intellectual Property Law* 447, 462.

the US from the TPP.¹³⁷ Trump criticised the disproportionate interest of transnational corporations in plurilateral and multilateral agreements which, in his opinion, often led to the loss of domestic jobs.¹³⁸ Although it is unclear what the fate of the TPP is, at present, the likelihood of future US involvement under the Trump administration is slight.¹³⁹

VI INVESTOR-STATE DISPUTE SETTLEMENT

As seen above in the TPP, one system that has begun trending throughout multilateral, plurilateral and bilateral agreements is investor-state dispute settlement (ISDS). ISDS is included in investment treaties and trade agreements to allow foreign companies to make claims against state governments if a change in national policy harms their investment.¹⁴⁰ Claims are settled in the international jurisdiction by bodies stipulated by the terms of the agreement.¹⁴¹ The purpose is to encourage and attract investment between party states with a promise of depoliticised regulation.¹⁴² ISDS dates back to the 1970s but was largely unpopular until a rapid increase in use at the turn of the century.¹⁴³ Before 2002 there were less than 100 known cases of ISDS claims, but by 2012 that figure jumped to 514.¹⁴⁴ Currently, ISDS systems of varying scopes are incorporated into over 3,000 agreements worldwide, 50 of which the US is party to.¹⁴⁵

Arising out of this global trend are two prominent IPR cases. In 2015, concluding proceedings which began domestically in 2011, tobacco giant Phillip Morris was unsuccessful in a claim against the Australian government relating to plain-packaging

¹³⁷ Alice Foster and Reiss Smith, 'What is TPP? Why is Donald Trump pulling out of the Trans-Pacific Partnership?', *Express* (online) 23 January 2017 <www.express.co.uk/news/politics/757837/TPP-what-is-Trans-Pacific-Partnership-trade-deal-Donald-Trump-why-pull-out-US-America>.

¹³⁸ *Ibid.*

¹³⁹ Stephanie Anderson, 'TPP: Government scrambles to salvage Trans-Pacific Partnership after Donald Trump pulls US out', *ABC News* (online), 24 January 2017 <www.abc.net.au/news/2017-01-24/donald-trump-tpp-federal-government/8207250>.

¹⁴⁰ Joseph Stiglitz, *Beware of TPP's Investor-State Dispute Settlement System* (28 March 2016) Roosevelt Institute <<http://rooseveltinstitute.org/beware-tpps-investor-state-dispute-settlement-provision/>>.

¹⁴¹ Won-Mog Choi, 'The Present and Future of the Investor-State Dispute Settlement Paradigm' (2010) 10(3) *Journal of International Economic Law* 725, 736.

¹⁴² *Ibid.* 735.

¹⁴³ *Ibid.* 739.

¹⁴⁴ Dan J. Ikenson, 'A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement' (2014) 57 *The Free Trade Bulletin* 1, 2.

¹⁴⁵ United States Trade Representative, *FACT SHEET: Investor-State Dispute Settlement (ISDS)* Office of the United States Trade Representative <<https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>>.

laws on cigarettes.¹⁴⁶ The substantive merits of the case were not dealt with in arbitration as it was ultimately held that Phillip Morris had no standing under the Hong Kong-Australia bilateral investment treaty because they initiated the case through an abuse of rights.¹⁴⁷ Concerns about replaying such an incident most likely led to the explicit exclusion of tobacco claims in the TPP.¹⁴⁸ In March of this year, a 2012 challenge by Eli Lilly against the revocation of two of its patents in Canada was similarly dismissed in arbitration.¹⁴⁹ The circumstances that led to the revocations were held to be natural, incremental developments of Canadian law that were not drastic enough to breach Eli Lilly's legitimate expectations as an investor under the North American Free Trade Agreement.¹⁵⁰

Dispute settlement is not often publicised and the trend of IPR arbitrations is very recent, making it difficult to predict how ISDS will affect US industry and global IPR policy. They also vary widely in scope and subject matter between agreements. Not least due to specific safeguards in the respective agreements, as well as thorough efforts by nation states, both Phillip Morris and Eli Lilly were unable to claim protection over their IPR through this method.¹⁵¹ Different could be said for disputes that could potentially arise over more one-sided agreements and against weaker countries. Nevertheless, the trend of ISDS carries a multitude of issues with complexities affecting both nations and corporations and these have been explored in more depth by other authors.¹⁵² Although a corporation is yet to succeed in making an IPR claim through ISDS, it provides an alternative to suing government-run corporations, or individual public servants as seen in the problematic incidents with Nelson Mandela in 1998 and with Pfizer and the Philippine government in 2007.¹⁵³ This direct avenue under international law is certainly a more secure method of

¹⁴⁶ AFP, *Plain packaging laws survive international court as Philip Morris warned over 'abuse of rights'* (17 May 2016) Australian Broadcasting Corporation <<http://www.abc.net.au/news/2016-05-17/philip-morris-loses-legal-battle-against-plain-packaging-laws/7420356>>.

¹⁴⁷ *Ibid.*

¹⁴⁸ Australian Fair Trade & Investment Network Ltd, *Foreign corporations could sue our governments* Australian Fair Trade & Investment Network Ltd <<http://aftinet.org.au/cms/isds-sue-governments-tpp-2013>>.

¹⁴⁹ Thomas Musmann, 'Eli Lilly v. Canada – The First Final Award Ever on Patents and International Investment Law' on Walters Kluwer, *Kluwer Patent Blog* (4 April 2017) <<http://kluwerpatentblog.com/2017/04/04/eli-lilly-v-canada-the-first-final-award-ever-on-patents-and-international-invest-ment-law/>>.

¹⁵⁰ *Ibid.*

¹⁵¹ Henning Grosse Ruse-Khan, 'Challenging Compliance with International Intellectual Property Norms in Investor–state Dispute Settlement' (2016) 19 *Journal of International Economic Law* 241, 242.

¹⁵² See generally Won-Mog Choi, 'The Present and Future of the Investor-State Dispute Settlement Paradigm' (2010) 10(3) *Journal of International Economic Law* 725; Henning Grosse Ruse-Khan, 'Challenging Compliance with International Intellectual Property Norms in Investor–state Dispute Settlement' (2016) 19 *Journal of International Economic Law* 241.

¹⁵³ Susan K Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TPP' (2011) 18(2) *Journal of Intellectual Property Law* 447, 471.

litigating rights although it is uncertain whether the challenges of this method will be less than private litigation.

VII ENFORCEMENT CHALLENGES

US industry has been increasing protection on an international level but, as demonstrated by the ACTA and TPP, there are factors sometimes beyond their control that could stymie their efforts. Despite victories in the different forums, practical enforcement of these increased (or otherwise) standards is another story. Increased protection at law gives corporations standing to litigate for greater control over their intellectual property and to seek a remedy for the foreign infringements. However, the law in some countries, generally those who infringe the most, has not reached a standard that makes even this possible. Especially without the aid of foreign governments, the volume of IPR infringement can simply go beyond the capacity of industry to police and control. Furthermore, despite their every effort, a final hindrance to industry enforcement attempts lies in negative public perceptions concerning their efforts.

Keeping up with Industry Demands

Even as US industries have tightened IPR protection on an international scale, they face enforcement barriers in high-infringement developing countries. Often, keeping up with high IPR standards is simply not possible for them as they deal with public health crises and high violent crime rates. This reality has seen sympathy from multilateral forums and has encouraged compulsory licensing and parallel importation. The gravity of the public health crisis is certainly hard to ignore. In developing countries alone, approximately 12.6 million people die from infectious diseases each year,¹⁵⁴ 40 million are infected with HIV/AIDS (6 million need retro-viral treatment to survive),¹⁵⁵ both malaria and tuberculosis kill 2 million people each annually,¹⁵⁶ and many other diseases result in hundreds of thousands of deaths.¹⁵⁷

Governments in these countries are compelled to take full advantage of TRIPS flexibilities to provide access to medicines for their nationals. The US has only been able to restrict compulsory licensing in as many developing nations as they have FTAs with, leaving major developing countries like India, Brazil and most of Africa free to use them liberally. In 2012, the Indian government granted a compulsory licence reducing the price of Bayer's treatment for a rare type of cancer from US\$5,000 per

¹⁵⁴ Bryan Mercurio, 'Resolving the Public Health Crisis in the Developing World: Problems and Barriers of Access to Essential Medicines' (2007) 5(1) *Northwestern Journal of International Human Rights* 1, 1.

¹⁵⁵ Susan K Sell, 'TRIPS-plus free trade agreements and access to medicines' (2007) 28 *Liverpool Law Review* 41, 43.

¹⁵⁶ Bryan Mercurio, 'Resolving the Public Health Crisis in the Developing World: Problems and Barriers of Access to Essential Medicines' (2007) 5(1) *Northwestern Journal of International Human Rights* 1, 1.

¹⁵⁷ *Ibid.*

month to \$200 per month.¹⁵⁸ Although the patent owner was German, the USTR was highly opposed to the decision, describing it in the Special 301 Report as 'concerning' in both 2012 and 2013.¹⁵⁹

In addition to compulsory licensing, general enforcement is difficult because these countries also live with the reality of patent offices that 'are under-staffed and stretched to the limit.'¹⁶⁰ In Brazil and Thailand, it can take up to 10 years to process a patent application.¹⁶¹ In 2015, one patent granted in India had been filed 19 years earlier.¹⁶²

The copyright industries have tried to address this administrative problem by advocating for public funding of IPR policing. The USTR continues to encourage foreign governments to invest more in public enforcement, expand the scope of police powers, and up-scale private monitoring over their efforts.¹⁶³ Reflecting the dynamics in plurilateral and unilateral activities, private-public association has become more evident in enforcement too.¹⁶⁴ For example, specialised copyright enforcement units in Brazil are almost wholly dependent on funding provided by industry groups who provide even basic resources like kitchen and office appliances.¹⁶⁵ The MPAA's Brazilian counterpart, the Association for the Protection of Movies and Music (APCM),¹⁶⁶ finances equipment, transportation,¹⁶⁶ for raids, locksmiths, and other support for the police.¹⁶⁷

Despite this, the copyright industry is still unsatisfied with the results. Of thousands of raids in countries like Mexico and Brazil, less than 0.5% result in a single criminal conviction.¹⁶⁸ The underlying trend towards the criminalisation of IPR infringements is a significant issue but lies outside the scope of this paper.¹⁶⁹ Corporations have made

¹⁵⁸ Srividhya Ragavan, 'Drugs, Drugs Everywhere but Just Not for the Poor' (2016) 8(1) *The WIPO Journal: Analysis of Intellectual Property Issues* 41, 41.

¹⁵⁹ *Ibid.*

¹⁶⁰ Susan K Sell, 'TRIPS-plus free trade agreements and access to medicines' (2007) 28 *Liverpool Law Review* 41, 63.

¹⁶¹ PhRMA, *Pharmaceutical Research and Manufacturers of America (PhRMA) Special 301 Submission 2017*, PhRMA <www.phrma.org/sites/default/files/pdf/PhRMA_2017_Special_301_Submission.pdf> 16.

¹⁶² *Ibid.*

¹⁶³ Joe Karaganis (ed), *Media Piracy in Emerging Economies* (Social Science Research Council, 2011) 20-21.

¹⁶⁴ *Ibid.* 21.

¹⁶⁵ *Ibid.*

¹⁶⁶ The American Assembly, *The MPAA in Latin America* (30 January 2012) Columbia University <piracy.americanassembly.org/the-mpaa-in-latin-america/>.

¹⁶⁷ Joe Karaganis (ed), *Media Piracy in Emerging Economies* (Social Science Research Council, 2011) 20.

¹⁶⁸ *Ibid.* 22.

¹⁶⁹ See generally Manoj Kumar. Sinha and Vandana Mahalwar, *Copyright Law in the Digital World: Challenges and Opportunities* (Springer Singapore, 2017), 299-327; Stuart P. Green, 'Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights' (2002) 54(1) *Hastings Law Journal* 167, 235-240; Irina D. Manta, 'The Puzzle

efforts to increase IPR-related 'training and sensitization' of those in the federal policing, customs and court systems.¹⁷⁰ However, 'In countries where judges routinely confront the consequences of extreme poverty and high rates of violent crime, the application of heavy fines and extended prison terms for street vending has proved a difficult sell.'¹⁷¹

Keeping up with Infringements

In their Special 301 submission for 2017, PhRMA highlighted among their key challenges weak patent enforcement in countries such as Brazil, China, India, and Australia.¹⁷² The majority of PhRMA's perceived global challenges come in the form of patent backlogs, restrictive patentability criteria, compulsory licensing and regulatory data protection failures, the amelioration of these comes largely with problems discussed above.¹⁷³ However, there remains a real issue with counterfeit drugs.¹⁷⁴ There are approximately 36,000 internet pharmacies active today and less than 5% are legitimate.¹⁷⁵ This is the case even after a 2015 multinational operation – involving 429 investigations – that seized over 20 million counterfeit medicines and shut down 2414 websites.¹⁷⁶ 'Project Pangea' and its failure to eliminate the threat of counterfeit drugs despite the involvement of 115 countries raises the question of whether enforcement can ever keep up with the level of infringement.¹⁷⁷

More obvious is the rampant piracy that the film and music industries have been battling, especially since the rise of the internet. The ease with which films and music can be pirated is common knowledge. By 2007, there were over 20,000 active cases initiated by the RIAA and MPAA against individual copyright infringers.¹⁷⁸ The difficulties with cross-border civil litigation are well known and the scale of copyright infringements far exceeds those of patents.

The RIAA spends approximately US\$45-55 million per year on anti-piracy measures while the MPAA spends approximately \$60-75 million per year.¹⁷⁹ For both, this

of Criminal Sanctions for Intellectual Property Infringement' (2011) 24(2) *Harvard Journal of Law & Technology* 469.

¹⁷⁰ Ibid 131.

¹⁷¹ Ibid 23.

¹⁷² PhRMA, *Pharmaceutical Research and Manufacturers of America (PhRMA) Special 301 Submission 2017*, PhRMA <www.phrma.org/sites/default/files/pdf/PhRMA_2017_Special_301_Submission.pdf> 13.

¹⁷³ Ibid.

¹⁷⁴ Ibid 30.

¹⁷⁵ Connor C Hensey and Amanda Gwee, 'Counterfeit drugs: an Australian perspective' (2016) 204(9) *Medical Journal of Australia* 344, 344.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Dee Majek, *Big Content's Big Blunders: Anti-piracy measures in the entertainment and copyright industries* (M.A. Cinema Studies, Stockholm University, 2013) 40.

¹⁷⁹ Joe Karaganis (ed), *Media Piracy in Emerging Economies* (Social Science Research Council, 2011),19.

accounts for half of their total annual budget.¹⁸⁰ Nevertheless, in 2015, it was reported that 12 billion visits to websites were to stream pirated content and there was a 25% rise in the use of sites to rip music from YouTube.¹⁸¹ The elusive and even tongue-in-cheek nature of pirate websites as well as the refusal of ISPs to bear responsibility presents a frustrating battle for copyright industries. As Nick Bilton put it, 'Stopping online piracy is like playing the world's largest game of Whack-A-Mole [sic]. Hit one, countless others appear. Quickly. And the mallet is heavy and slow.'¹⁸²

Some have commented on the futility of countering piracy with tighter law enforcement. Recommendations from economic perspectives have suggested that a more effective method may be innovation in developing access through platforms that ultimately provide consumers with a better service on which to access their movies and music.¹⁸³ Service platforms like Netflix and Spotify have shown promise in this strategy, though there are still many challenges facing them.¹⁸⁴ The copyright industries however have been slow in adopting these other methods, and continue to lobby heavily for legal protection.

Skepticism and Public Protest

Finally, the patent and copyright industries have garnered much criticism from many players active in the IPR debate, especially the general public. The pharmaceutical, film and music industries have experienced adverse publicity revolving around certain measures they have taken to further their causes.

Against the backdrop of a reported 1.7 billion people with inadequate or no access to essential medicines, pharmaceutical corporations are perceived as insensitive at best.¹⁸⁵ In 2007, when Thailand announced plans for compulsory licences, Abbott Laboratories' threatened to remove all pending drug applications in the country and sued ACT-UP Paris – who was representing AIDS patient groups – for retaliatory efforts which involved overwhelming the Abbott Laboratories' website server. This was regarded as 'a public relations disaster for the industry as a whole.'¹⁸⁶

The copyright industries have experienced a similar backlash. The RIAA has the public relations ghosts of lawsuits against a disabled single mother who claimed

¹⁸⁰ Ibid.

¹⁸¹ MUSO, *Global Music Piracy Insight 2016*, MUSO <<https://www.muso.com/market-analytics-global-music-insight-report-2016/>>.

¹⁸² Nick Bilton, 'Internet Pirates Will Always Win', *The New York Times* (New York) 4 August 2012, SR5.

¹⁸³ See generally Dee Majek, *Big Content's Big Blunders: Anti-piracy measures in the entertainment and copyright industries* (M.A. Cinema Studies, Stockholm University, 2013) 40.

¹⁸⁴ Ibid.

¹⁸⁵ Bryan Mercurio, 'Resolving the Public Health Crisis in the Developing World: Problems and Barriers of Access to Essential Medicines' (2007) 5(1) *Northwestern Journal of International Human Rights* 1, 1.

¹⁸⁶ Susan K Sell, 'TRIPS Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, and TPP' (2011) 18(2) *Journal of Intellectual Property Law* 447, 470.

severe harassment, and against another single mother who was charged \$222,000 for sharing \$24 worth of songs.¹⁸⁷ Although the RIAA has largely stopped suing individuals, the general public in foreign nations are appreciably reluctant to import laws that allow for such outcomes. This was evidenced by the massive protests that put a stop to ACTA.

Further scrutiny arises out of the profitability of big pharmaceutical, recording, and motion picture corporations. Pfizer made \$14.5 billion dollars in net profit for 2015, an improvement from the previous year.¹⁸⁸ The MPAA reports 5% growth in global box office from 2014 to 2015 at US\$27.2 billion.¹⁸⁹ Warner Music Group's revenues for 2016 amounted to \$3.24 billion, up 9.4% from the previous year.¹⁹⁰ While many factors contribute to these figures, this shows the public that they are making healthy profits despite their doomsday rhetoric concerning weak IPR protection.

This exacerbates the challenges in the flow of the IPR debate which copyright industries are failing dismally to control. The average consumer does not view film or music piracy as immoral.¹⁹¹ The RIAA and MPAA's constant assertions against piracy have, in some cases, become a laughing stock.¹⁹²

CONCLUSION

How successful the US industries have been in securing greater IPR protection depends on one's definition of success. Ironically, the WTO, where we saw the largest step forward in heightening global IPR protection with the TRIPS Agreement, is the only forum in which we have seen a regression in industry efforts with the 2001 Doha Declaration. All other forums have built on TRIPS standards, with the sturdiest progress in the FTAs. While the global IPR policy is certainly moving in the direction of higher protection, the progress can be seen as frustratingly small. With no substantive progress in the multilateral forums for almost 20 years, a lack of IP related trade agreements with most major US trading partners or Watch List countries, and no real success with the ACTA and the TPP, it is difficult to justify the exhausting negotiations and millions spent annually for campaigning. Further, the enforcement

¹⁸⁷ Dee Majek, *Big Content's Big Blunders: Anti-piracy measures in the entertainment and copyright industries* (M.A. Cinema Studies, Stockholm University, 2013) 40-41.

¹⁸⁸ Pfizer, *Annual Report*, (2016) Pfizer, Appendix A.

¹⁸⁹ Motion Picture Association of America, *Theatrical Statistics Summary* (2015), Motion Picture Association of America, <http://www.mpaa.org/wp-content/uploads/2016/04/MPAA-Theatrical-Market-Statistics-2015_Final.pdf>, 2.

¹⁹⁰ Ed Christman, 'Warner Music Group 2016 Earnings See First Post-Blavatnik Profit', *Billboard* (online) 8 December 2016 <www.billboard.com/articles/business/7616355/warner-music-group-financial-results-2016-revenue>.

¹⁹¹ Dee Majek, *Big Content's Big Blunders: Anti-piracy measures in the entertainment and copyright industries* (M.A. Cinema Studies, Stockholm University, 2013) 17.

¹⁹² *Ibid* 13.

challenges discussed above make the money spent on international litigation, sponsorship of public organisations, and marketing seem futile.

US film, music and pharmaceutical industries appear to be willing to accept the resource-heavy and slow nature of the battle as they have not ceased their efforts or made recourse to many other alternatives. In that light, pushing the battle forward on several forums is still important because developments do not occur in isolation, and they all set a web of interlocking precedents that help drive even further protection in future agreements, regardless of what forum. Compliance with existing treaties, for example, can be a requirement in a multilateral trade agreement, and the terms of one bilateral agreement may be exported to a new plurilateral agreement.¹⁹³ Indeed, this has been the explicit strategy of the US, with former USTR official, Robert Zoellick, stating 'If free trade progress becomes stalled globally... then we can move ahead regionally and bilaterally... Having a strong bilateral or sub-regional option helps spur progress in the larger negotiations.'¹⁹⁴ Progress is being made in a direction favouring the US IPR industries.

¹⁹³ Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Edward Elgar Publishing, 2008) 31.

¹⁹⁴ *Ibid* 42.